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MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-444

MISSOURI PACIFIC RAILROAD COMPANY,
a Missouri Corporation,
Petitioner,

vs.

WILLIAM A. SMITH CONTRACTING COMPANY, INC.,
a Missouri Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, KANSAS CITY DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, KANSAS CITY DISTRICT

The petitioner, Missouri Pacific Railroad Company, a Missouri corporation, respectfully prays that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Kansas City District, entered in this proceeding on April 3, 1972.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Kansas City District, the only written opinion in this case, is reported in 481 S.W.2d 580, and a copy appears in the Appendix hereto.

JURISDICTION

A judgment herein, in favor of this petitioner, was originally entered in the Circuit Court of Missouri, Sixteenth Judicial Circuit, on September 22, 1971; thereafter, respondent herein perfected a timely appeal to the Court of Appeals, Kansas City District, and that Court, on April 3, 1972, reversed the trial court and, by written opinion, directed the trial court to set aside its judgment in favor of this petitioner and to enter judgment in favor of respondent herein; a timely "Motion for a Rehearing or in the Alternative for Transfer to the Supreme Court of Missouri" was then filed by petitioner herein in the Missouri Court of Appeals, Kansas City District, but that Court denied that Motion, without opinion, on May 11, 1972; this petitioner then filed in the Supreme Court of Missouri a timely "Application of Defendant-Respondent Missouri Pacific Railroad Company for an Order Transferring this Case from the Missouri Court of Appeals, Kansas City District, to the Missouri Supreme Court Pursuant to Civil Rule 83.03," but the Supreme Court of Missouri denied that Application, without opinion, on July 17, 1972; this petition for certiorari was filed within ninety (90) days after the action of the Supreme Court of Missouri denying the Application to Transfer. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Is an otherwise valid hold harmless provision in a construction contract, which relieves a railroad from liability for damage sustained by a contractor's equipment during transit, valid and enforceable when the damage complained of occurred while such equipment was being transported by the railroad pursuant to the express terms of a written construction contract which required the railroad to transport the equipment to the job site free of charge for use by the contractor in repairing the railroad's right-of-way and which contract also provided that, in consideration of such free carriage, the contractor would hold the railroad harmless on account of any damage occurring during such transit, or is such hold harmless provision rendered void and unenforceable by the Carmack-Cummins Amendment to the Interstate Commerce Act, 49 U.S.C. 20(11)?

STATUTORY PROVISIONS INVOLVED

Carmack-Cummins Amendment to the Interstate Commerce Act, 49 U.S.C. 20(11). Copy is set out in the Appendix.

STATEMENT OF THE CASE

This case was submitted to the trial judge on an agreed statement of facts. (See pages 10 to 13 of Transcript on Appeal.)

The facts agreed upon, which are pertinent to this petition, are that petitioner and respondent entered into a

written contract under the terms of which respondent construction company was engaged by the petitioner railroad to repair the railroad's track in Texas. One provision of that construction contract required the railroad to transport, free of charge, respondent's construction equipment, from Kansas City, Kansas, to the job site in Texas, for use by respondent on the job. Another provision of the contract provided that, in consideration of such free carriage of the contractor's equipment to the job site by the railroad, the contractor would hold the railroad harmless from any damage occurring to that equipment during such transit, in these words:

> "In consideration of the money saved to Contractor by such transportation, and for the protection of Carrier and persons affected by granting such transportation, Contractor hereby agrees to hold carrier free and harmless from all liability, loss, damages, costs and expenses, arising from or growing out of any accident or casualty however caused, and whether or not caused by the negligence of agents or employees of the Carrier, to the property of Contractor or to the property of sub-contractors employed on or about the Work, and to the property of the agents and employees of Contractor and of the agents and employees of sub-contractors, and from all liability for death, loss, injury or damage, however caused, and whether or not caused by the negligence of agents or employees of Carrier, to Contractor, or to sub-contractors, or to the agents and employees of Contractor, or to the agents and employees of sub-contractors, if and while said persons or property are being transported in accordance with this paragraph C on or over any of the lines of Railroad of Carrier."

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While respondent's equipment was being transported to the job site by petitioner, as required by the terms of the construction contract, it was damaged in an amount agreed upon.

Respondent then filed its petition for damages, alleging that petitioner was a common carrier for hire, was therefore subject to the provisions of the Interstate Commerce Act and asking judgment in the amount of its damage sustained as above set out, under the provisions of that Act. (See pages 2 to 6 of Transcript on Appeal.)

This petitioner filed an answer to respondent's petition affirmatively denying that it was subject to the provision of the Interstate Commerce Act as to the particular shipment here involved and interposed the hold harmless agreement in the construction contract as a defense to respondent's claim. (See pages 7 to 9 of Transcript on Appeal.)

The case was briefed and submitted on the question of whether the particular shipment here involved was performed by the railroad in its usual capacity as a common carrier and therefore subject to the provisions of the Carmack-Cummins Amendment, in which event the hold harmless provision in the construction contract would be rendered void and unenforceable by the provisions of the Carmack-Cummins Amendment, or whether the particular shipment here involved was performed by the railroad, not in its usual capacity as a common carrier, but in performance of a "special engagement" for private carriage created by the terms of the construction contract, and therefore free of the restrictive provisions of the Carmack-Cummins Amendment, in which event the hold harmless provision in the construction contract would be valid and enforceable.

Thus, in the original pleadings and arguments, a federal question was joined, respondent claiming a right, privilege or immunity set up and claimed under a United States statute, i.e., the Carmack-Cummins Amendment to the Interstate Commerce Act, 49 U.S.C. 20(11), and petitioner denying the applicability of that statute to the particular shipment under examination.

REASONS FOR GRANTING THE WRIT

1. A State Court has decided a federal question in conflict with applicable decisions of the Supreme Court of the United States.

A federal question is involved because the Courts of Missouri have held that a federal statute, i.e., the Carmack-Cummins Amendment to the Interstate Commerce Act, 49 U.S.C. 20(11), renders void and unenforceable an otherwise valid hold harmless agreement in a construction contract between a railroad and a contractor.

This decision of the Missouri Courts is, we contend, not in accord with the decision of this Court in *Santa Fe, Prescott & Phoenix Railway Company* v. *Grant Brothers Construction Company*, 228 U.S. 177, 33 S.Ct. 474, 57 L.Ed. 787.

The pertinent facts in the *Grant* case, supra, and in the case at bar are remarkably similar. In both cases a railroad had engaged a contractor to perform construction work on its roadbed. In both cases the construction contract provided that the railroad was required to transport the contractor's equipment to the job site for use by the contractor on the job, free of charge in the case here under consideration, or at a reduced rate in the *Grant* case. In both cases the construction contract included a hold

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harmless agreement relieving the railroad from all liability for damage occurring to the contractor's equipment while being so transported. In both cases the contractor's equipment was damaged while being so transported.

The legal point at issue was also the same in both cases. In both cases the contractor contended that the hold harmless agreement in the contract was void and unenforceable because it violated the applicable law then in force, which prohibited a common carrier from contracting away its usual liability for damage occurring to a shipment during transit, while the railroad contended that such prohibition was applicable only when a railroad was engaged in its ordinary business as a common carrier and did not apply when a railroad was not acting as a common carrier but was engaged in carrying out the "special engagement" of hauling its contractor's equipment free of charge to the job site pursuant to the terms of a written construction contract.

The applicable law was the same when both cases were decided. When *Grant* was decided, it was just as illegal, under the common law, for a railroad to attempt to contract away its liability for its own negligence while operating as a common carrier as it is now under the provisions of the Carmack-Cummins Amendment. All the Carmack-Cummins Amendment did was to codify, without change, a common law rule that had long been in existence. (See *Missouri Pacific Railroad Company* v. *Elmore and Stahl*, 377 U.S. 134, 84 S.Ct. 1142, 12 L.Ed.2d 194, and *Santa Fe, P. & P. Ry. Co.* v. *Grant Brothers Construction Company*, 228 U.S. 177, 33 S.Ct. 474, 57 L.Ed. 787.)

But what the *Grant* case held and what the Missouri Courts have failed to understand was, *first*, that the rule

prohibiting a railroad from contracting away its usual liability for damage occurring to a shipment during transit (whether expressed as part of a common law or by the Carmack-Cummins Amendment), applies to a railroad only when that railroad is engaged in its usual business as a common carrier, and that the rule, no matter how expressed, does not apply to a railroad when that railroad is engaged in performing a "special engagement," and, *second*, that a railroad is engaged in performing a special contractual engagement and is not engaged in its usual business as a common carrier, when it is engaged in transporting a contractor's equipment to the job site pursuant to the terms of a construction contract and is therefore not prohibited by law from limiting its liability for damage occurring to such equipment during such transit.

The question of whether the shipment involved was interstate or intrastate is irrelevant. The question is: Was the railroad acting as a common carrier? If it was not, then the rule does not apply as was well-stated in the *Grant* case in these words:

> "Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service."

Other cases holding that a railroad is not acting in its usual capacity as a common carrier under different fact situations are listed in the Table of Cases. In each of these decisions, the Courts followed the principle laid

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down in the *Grant* case and held the railroad was not liable under the terms of a special contract because it was not acting as a common carrier.

The Supreme Court of Missouri has refused to follow the rule laid down in the *Grant* case. The opinion in the *Grant* case cannot be reconciled with the opinion in the case at bar. One must be wrong.

We respectfully submit that the Courts of Missouri have decided a federal question in a way not in accord with an applicable decision of this Court.

2. The decision of the Missouri Courts raises an important, significant recurring problem that only this Court can settle.

The petitioner herein and many other railroads have long pursued a practice of granting free carriage of contractor's equipment to a job site in exchange for a hold harmless agreement in all construction contracts. (See affidavit of P. P. Wagner, Jr., attached to Application in the Supreme Court of Missouri for Transfer to that Court.) Many such contracts are now in existence.

The validity of such contracts has never been challenged since *Grant* until this case was filed. The validity of such contracts in states other than Missouri is now put in question. Will such other states follow the law laid down in *Grant* or the law laid down by the Missouri Courts? Should this railroad, and other railroads, continue to include hold harmless agreements in their construction contracts in all states except Missouri? Because of the interstate character of railroads, it is necessary that one rule of law apply in all states, and this Court is the only Court that can provide such a common rule. The Missouri decision has created unnecessary confusion and uncer-

tainty in the application of the Carmack-Cummins Amendment to contracts where none existed before.

We respectfully submit that this is a recurring problem that only this Court can settle.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Missouri Court of Appeals, Kansas City District.

Respectfully submitted,

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APPENDIX 1

Copy of Opinion & Judgment of Missouri Court of Appeals, Kansas City District

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

No. 25645

WILLIAM A. SMITH CONTRACTING COMPANY, INC.,
Appellant,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

Opinion Filed April 3, 1972
Appeal from the Circuit Court of Jackson County
Honorable Julian M. Levitt, Judge

(Received April 4, 1972)

PER CURIAM:

About July 2, 1966, plaintiff made a contract with defendant that plaintiff would construct main and auxiliary tracks and appurtenances and to rehabilitate the former Southern branch line between Marlin and Waco, Texas, all owned by defendant. In the contract defendant agreed to transport plaintiff's contractor's equipment to the construction site without transportation costs. This equipment was to be used by plaintiff solely for the purpose of performing the work required of it under the construction contract which further provided that plaintiff would hold defendant free and harmless from all liability for damages

to plaintiff's property from any cause including negligence of defendant's agents and employees. While en route from Kansas City, Kansas to Waco, Texas, the contractor's equipment suffered damages, stipulated by the parties to be a total of $7,599.02. Plaintiff sued for the damages and the judgment of the trial court was for defendant.

The question is whether defendant was engaged in the performance of its ordinary duties as a common carrier at the time it accepted plaintiff's shipment to the construction site so as to be subject to the Carmack-Cummins Amendment, 49 U.S.C.A., Section 20(11), which declares invalid in such circumstances contracts exempting the carrier from liability; or was the shipment accepted as a "special engagement" of defendant acting in some capacity other than that of a common carrier, which would not subject it to restrictions of the Interstate Commerce Act, and the Carmack-Cummins Amendment?

Additional stipulated facts upon which the action was submitted to the trial court are these: Plaintiff has received at least $218,122.63 as payment for its work performed under the construction contract; plaintiff has not been billed for shipping charges for the contractor's equipment, nor has it paid any amounts designated as payment for shipping charges; the bill of lading for the shipment shows consignment to the "Missouri Pacific Railroad, c/o William A. Smith Contracting Company, Inc., at East Waco, Texas," with the defendant's railroad as the route of shipment; and the bill of lading did not include the weight of shipment or the freight weight, but it did include under the heading "Shipper's Special Instructions" the comment "Free Billing—contract account."

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Defendant relies principally upon the 1913 case of *Santa Fe, Prescott & Phoenix Railway Company* v. *Grant Brothers Construction Company*, 228 U.S. 177, 33 S.Ct. 474, 57 L.Ed. 787. The facts there were that pursuant to a construction contract the railroad agreed, at a reduced tariff rate than that accorded to the general public, to transport men and materials to and from the construction site, and further after it was completed, to a site where further grading was to be done by the contractor. The cars carrying the equipment were placed on a track in a desert without water, inhabitants, a station agent or fire apparatus. The cars were left without a watchman in charge, and the contractor's property was lost by fire. The railroad's agreement to carry the contractor's property was to be peformed within Arizona—an intrastate shipment. In denying the contractor a recovery and in declaring valid the provision of the contract, "that the company shall assume no obligation or risk in case of accident or damage to men and supplies", the court did state the common law rule: "It is the established doctrine of this court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation." (citing cases), 228 U.S. 184, and said further, "Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. * * * It is apparent that there may be special engagements which are not embraced within its duty as a common carrier although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation." 228 U.S. 185.

The *Grant* case is distinguishable on its facts, and importantly, that it was decided before Congress declared the public policy of the nation by the Carmack-Cummins

Amendment of 1915, providing that a common carrier of property in interstate commerce may not relieve itself of liability by contract. See Historical Note to 49 U.S.C.A., Sec. 20(11); and 14 Am. Jur. 2d, Carriers, Sec. 539, p. 67, and Sec. 554, p. 76. Other cases cited by defendant are also distinguishable. *Terminal Railroad Ass'n of St. Louis* v. *Ralston-Purina Co.*, Mo., 180 S.W.2d 693, was an indemnity case for recovery of damages for the death of a switchman under the Federal Employer's Liability Act, the death occurring on a track leading to defendant's plant, and no interstate shipment of property was involved. There was also no interstate shipment of property in *Settle* v. *Baldwin*, Mo., 196 S.W.2d 299, that being a case for recovery of damages for the furnishing of an unsafe refrigerator car under a tripartite contract. In *Insurance Company of North America* v. *Elgin, Joliet & Eastern Railway Company* (CA 7th), 229 F.2d 705, although the *Grant* case rule, supra, of special arrangements was set forth, there was again no interstate shipment of property for the damage to which recovery was sought.

It is settled that the Interstate Commerce Act, 49 U.S.C.A., Sec. 20(11), codified the common law with respect to a common carrier's liability for damage to a shipper's property, i.e., that the carrier is liable for the full actual loss, damage or injury caused by it unless it can show that the damage was caused by (a) the act of God, (b) the public enemy, (c) the act of the shipper himself, (d) public authority, or (e) the inherent vice or the nature of the goods. *Missouri Pacific Railroad Co.* v. *Elmore & Stahl*, 377 U.S. 134, 84 S.Ct. 1142, 12 L.Ed.2d 194, 197; *Hamilton Manufacturing Company* v. *Chicago & Northwestern Ry. Co.* (D.C.Wisc.), 176 F.Supp. 546, 548. There is no contention that any of these exceptions apply. It is also said that the liability of the carrier for loss,

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damage or injury to interstate shipments is governed by the Interstate Commerce act and the United States Courts. *Missouri Pacific Railroad Company* v. *H. Rouw Company* (CA 5th), 258 F.2d 445.

There is no question but that defendant is a common carrier within the purview of the Interstate Commerce Act. See 13 Am.Jur.2d, Carriers, Sections 1, 2, p. 560. As a common carrier it was under a duty to accept for shipment plaintiff's contractor's equipment. 13 Am. Jur. 2d, Carriers, Sec. 235, p. 749. This equipment did not belong to defendant, but to plaintiff, and it is of no consequence that the bill of lading showed the consignee to be "Missouri Pacific Railroad, c/o William A. Smith Contracting Company, Inc." There is no stipulation of fact that plaintiff had any control over the shipment while it was en route to Waco, Texas, which perhaps might make applicable the circus train cases mentioned in 13 C.J.S., Carriers, Sec. 117, p. 229, but the stipulation of facts show that the defendant had control of the shipment when it was damaged. Under all the facts, it must be held that defendant was acting as a common carrier and not pursuant to a "special engagement" under its contract with plaintiff that the latter perform construction work for defendant on its property. The Carmack-Cummins Amendment, supra, applies, and thereunder defendant's attempt to limit its liability for negligence is void. 13 C.J.S., Carriers, Sec. 97(2), pp. 187, 188; 13 C.J.S., Carriers, Sec. 99, p. 193; 14 Am.Jur. 2d, Sec. 554, p. 76. See also *Union Pacific Railroad Company* v. *U. S.*, 292 F.2d 521, 523, 524, 154 Ct.Cl. 427; and *Chicago & N.W. Ry. Co.* v. *Davenport* (CA 5th), 205 F.2d 589, 594, et seq. (where the railroad sought to recover for damages paid its employee under an indemnity provision in a contract for haulage of a circus train, which provision was held void. Compare also

Resolute Insurance Co. v. *Morgan Drive-Away, Inc.*, Mo. App., 403 S.W.2d 913, 918 [5].

Defendant says in its brief that if the judgment should be reversed, then it is entitled to have judgment on its counterclaim for $595.32. This amount was stipulated to be defendant's freight charges, and the same was prayed for in its counterclaim below. Judgment on that counterclaim was against defendant, and no notice of appeal was filed by defendant, which fact precludes its consideration here regardless of the stipulation. Civil Rules 82.04, 82.05, V.A.M.R., *Hance* v. *Johnson, Stephens & Shinkle Shoe Company*, Mo. App., 306 S.W.2d 80. Plaintiff does not concede that its requested judgment on its stipulated damages, $7,599.02, be here reduced by the amount of the freight charges.

The judgment is reversed and the case is remanded with directions to enter judgment for plaintiff in the amount of $7,599.02.

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APPENDIX 2

49 U.S.C. 20(11) Carmack-Cummins Amendment to Interstate Commerce Act

Section 20, Par. 11. *Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.* Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable

to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper

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or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period or institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified

in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.